No. 15332

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH N. LATTANZIO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of the offense contained in a one count indictment which charged him with knowingly transporting a woman, namely, Ernestine M. Noland, in interstate commerce from Los Angeles County, California, within the Central Division of the Southern District of California, to Yerington, Nevada, for prostitution, debauchery and other immoral purposes, in violation of Title 18, Section 2421 of the United States Code.

The District Court had jurisdiction based upon Title 18, Section 3231, and this court has jurisdiction to entertain the appeal and review the judgment under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

II.
Statement of the Case.

Appellant was convicted in a one count indictment which charged him with a violation of Title 18, Section 2421 of the United States Code. This section is commonly referred to as the "White Slave Traffic Act."

The victim, Ernestine M. Noland, was known by several aliases including Teen Howard and Teen O'Neil. She worked as a prostitute at the Town House, Yerington, Nevada, under the name Lee Thornton on and after September 28, 1955. Ernestine M. Noland, alias Teen O'Neil, had been a prostitute. She was having disagreements or arguments with her "boy friend" with whom she was residing, and desired to resume the age-old profession.

On September 26, 1955, she went on a double date and during the course of the evening the four persons entered the Keynoter Bar located on Santa Monica Boulevard in Los Angeles, California. In the bar, Seymour L. Winston, and Henry Rose, the two men on said double date, spent most of their time entertaining the various patrons of the bar at the piano. The other girl, Kathleen Ray Stuart, remained at the bar. Ernestine M. Noland, hereinafter referred to as Teen, went up to appellant, asked him if he was Joe, stated she heard he is at the Town House and asked appellant how things are at the Town House [testimony of appellant, Tr. p. 139, lines 9 to 12, incl.]. Appellant and Teen then discussed what the girls were making per "trick" at the Town House, how much of the price per trick was received by the girl, the cost for room and board for the prostitute employed there and the percentage obtained on the drinks [Tr. pp. 79, 80 and 81]. Appellant, according to the testimony of the victim,

Teen [Tr. p. 83, lines 1 to 5 incl.], told her he would meet her the next morning, that he was going to Nevada and would take her to lunch. Appellant testified that he told Teen he was leaving the next morning, that he said he would call and he did telephone her the next morning before departing for Nevada [Tr. p. 140, line 25 *et seq.;* p. 141, lines 1 and 2]. Appellant testified on cross-examination, that on the night he met Teen in the Keynoter Bar, on September 26, 1955, he actually did not tell her that he would take her to lunch the following day and that in fact, he did not have her telephone number but that he believed he gave her his telephone number and she telephoned him the next morning at his parents home, concerning having lunch with him that day [Tr. p. 153, line 25 *et seq.,* and p. 154].

On the morning of September 27, 1955, the day after appellant and Teen met in the Keynoter Bar, Teen packed up and went to Yerington, Nevada. Her girl friend, Kathleen Ray Stuart was present that morning in the apartment which Teen occupied with Thomas D. Howard. Teen and Miss Stuart moved Teen's bags [Tr. p. 21, line 20], clothing on hangers, viz., a coat, jacket and dresses and a radio [Tr. p. 22, lines 5 to 10 incl.] into the automobile of Miss Stuart.

Teen and Miss Stuart went to the Office Bar, located on Vine Street in Hollywood, California [Tr. p. 22, line 23]. There they were joined by appellant [Tr. p. 23, lines 16 and 17]. Only general conversation ensued in the bar [p. 24, line 5]. *Cf.,* Appellant testified to the contrary. He said that while in the Office Bar, Teen told him she was "having an awful beef" and would like to get away "and do you mind if it appears like I go with you?" [Tr.

pp. 156-158]. The three then walked out of the bar to the adjacent parking lot where appellant drove up his 1954 or 1955 blue or blue and white automobile and all three persons, including appellant, participated in the transfer of the aforesaid articles of Teen from the automobile of Miss Stuart into the car of appellant [Tr. p. 25, lines 9 to 14 incl.; also Tr. p. 24, lines 16 and 17].

In the parking lot, Miss Stuart was invited by appellant "to go along on a trip" and she said, "No, thank you, I like to stay in Los Angeles" [Tr. p. 26, lines 18 to 21 incl.]. It was stated in a "jesting manner" when appellant stated: "Why don't you come along on a trip, come along with us. I said (Miss Stuart) that I am perfectly happy where I am right now" [Tr. p. 27, lines 4 to 8 incl.]. Appellant also made a "jest" of the fact Miss Stuart's car was old and stated in substance: "Would you like to have a new car?" [Tr. p. 27, line 20]. There was nothing said by appellant or Teen to Miss Stuart concerning where they were going, but appellant did say something about coming along with them on a trip [Tr. p. 28, lines 13 to 17 incl.].

Miss Stuart observed the departure of her girl friend, Teen, with appellant [Tr. p. 29], and did not see her again for several months [Tr. p. 30, line 1].

After Teen and Miss Stuart had departed from the apartment of Teen and Thomas D. Howard, Mr. Howard walked to the vicinity of 1646 North Vine Street. He saw a man driving a Buick out of a parking lot. Mr. Howard could not say for sure that it was appellant but testified there was a resemblance [Tr. p 44, line 24]. He thought the woman in the car was Teen [p. 45, line 22].

According to the testimony of both Teen and appellant they proceeded from the parking lot on Vine Street to the Copper Cart in Los Angeles. Appellant left Teen in the Copper Cart while he went to visit his parents who lived a quarter of a block from the Copper Cart [Tr. p. 166, line 21]. Appellant returned to the Copper Cart and he and Teen had lunch and visited with several acquaintances of appellant [see Tr. p. 91].

After lunch, according to Teen, she telephoned a cab, got her bags and things out of the automobile of appellant, and departed [Tr. pp. 90 and 91].

Both Teen and appellant denied that appellant drove Teen from California to Nevada.

Teen testified that on the first day of her arrival at the Town House in Yerington, Nevada, she saw appellant there [Tr. p. 96, lines 8 to 13 incl.]. She further testified that she worked there as a prostitute [Tr. p. 96, lines 17 and 18].

After the termination of her employment at the Town House, Teen returned to Los Angeles. On or about February 10, 1956, subsequent to investigation by the government of the instant offense by appellant, Teen accidentally met appellant on a street in Hollywood, California. Appellant was accompanied by two other men [Tr. p. 97]. Ultimately, Teen testified that in the ensuing conversation, appellant "said he wasn't going to go to jail and if he did something would happen to me (meaning Teen)" [Tr. p. 109, lines 10 and 11].

Appellant testified that he left the Copper Cart in Los Angeles on September 27, 1955, about ten minutes after Teen departed [Tr. p. 145, line 17]. On the trip from Los Angeles to Yerington, Nevada, on September 27,

1955, appellant encountered an acquaintance named Ann Hawthorne [Tr. p. 170], a gas station attendant whom appellant knew [Tr. p. 171], and other persons appellant has known [Tr. p. 170].

Appellant departed from Los Angeles for Yerington, Nevada, at about 1:30 p.m., in the afternoon of September 27, 1955 [Tr. p. 171, lines 21 to 25 incl.]. He arrived not later than midnight that date [Tr. p. 146, line 25]. He made no stops on the way [Tr. p. 170, lines 5 and 6] except to obtain gasoline and to visit friends [Tr. p. 170].

Within one hour or an hour and a half after his arrival in Yerington, appellant saw Teen at the Town House [Tr. p. 173, lines 11 to 19 incl.].

III.
Statutes Involved.

Appellant was indicted for a violation of United States Code, Title 18, Section 2421 which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate . . . commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman . . . to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . ." shall be guilty of an offense.

IV.
ARGUMENT.

Appellant appeals from a conviction. He contends that the trial court erred in denying the motions of appellant for judgment of acquittal and committed prejudicial error in permitting the government to ask certain questions of appellant on cross-examination.

A.
The Denial of the Motion for Judgment of Acquittal by Appellant, After the Government Rested Its Case in Chief, Was Proper.

Defendant's motion for acquittal at the conclusion of the government's evidence presents a question as to the sufficiency of the evidence.

United States v. Perplies, 165 F. 2d 874.

> "The purpose or intent in prosecution for transporting a woman in interstate commerce for immoral purpose may be proved by circumstantial evidence. . . ."
>
> *Tedesco v. United States* (9th Cir.), 118 F. 2d 737, 741.
>
> Accord: *Aplin v. United States* (9th Cir.), 41 F. 2d 494, 496.

There was sufficient evidence of the guilt of appellant. A review of the evidence adduced at the trial, at the conclusion of the government's case discloses that the victim, Ernestine M. Noland, also known as Teen O'Neil, had been a prostitute. She was residing with but having arguments with her boyfriend, Thomas D. Howard. She met appellant in a bar in Los Angeles during the evening of

September 26, 1955. They discussed the price received per trick by the prostitutes working at the Town House in Yerington, Nevada, the amount received by them as their share of the drinks sold, and the cost for their room and board while so employed at the Town House. The next morning, Teen packed her belongings and left the apartment. Miss Stuart assisted Teen in placing Teen's effects into the automobile of Miss Stuart. They proceeded to the Office Bar on Vine Street in Hollywood and were joined by appellant. Shortly thereafter, all three walked to the parking lot and participated in placing the suitcases, clothing on hangers including a coat, and the radio of Teen into the automobile of appellant. While in the parking lot, appellant jokingly asked Miss Stuart if she would like to go along with Teen and appellant on a trip. Miss Stuart stated she preferred to remain in Los Angeles. Again appellant jokingly sought to perhaps recruit Miss Stuart as an additional employee at the Town House; he asked if she would like to have a new car. She replied in the negative. Appellant and Teen then departed in the automobile being driven by appellant. Within a day or so, in September of 1955, appellant and Teen were each at the Town House in Yerington, Nevada, and Teen was working there as a prostitute.

Although Teen denied that she travelled to Yerington in the company of appellant, she reluctantly testified that on or about February 10, 1956, he jokingly told her that he was not going to jail and if he did something would happen to her.

It was properly for the jury to determine whether or not Teen had been threatened by appellant and for this reason did not testify truly when she denied that she travelled to Yerington with appellant. The jury could

properly refuse to accept as true the portion of Teen's testimony wherein she denied being transported by appellant. The jury was permitted to deduce from her apparent reluctance to testify and said denial that they were occasioned by the threat by appellant. Further, the jury could properly consider the threat as affirmative evidence of a consciousness of guilt; that appellant, knowing he was guilty and was apt to be convicted, attempted to suborn by fear the anticipated testimony of the principal government witness of the actual transportation. Exclusive of the denial by Teen of transportation by appellant, there was sufficient evidence from which the jury could properly have inferred the transportation and guilt of appellant. Accordingly, the denial of appellant's motion was proper.

B.

The Motion of Appellant for Judgment of Acquittal When All of the Evidence Was in Was Properly Denied.

A conviction may be sustained where there is substantial evidence, although conflicting, and the conflict is to be resolved in favor of the appellee.

> *Todorow v. United States* (C. A. 9, 1949), 173 F. 2d 439, cert. den. 337 U. S. 925.

"Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ."

> *Woodward Laboratories, Inc., et al. v. United States* (C. C. A. 9, 1952), 198 F. 2d 995, 998;
>
> *Battjes v. United States* (C. A. 6, 1949), 172 F. 2d 1.

The true rule . . . is that a trial judge, in passing on a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt, beyond a reasonable doubt.

Curley v. United States (D. C. Cir., 1947), 160 F. 2d 229, 232, cert. den. 331 U. S. 837.

In consideration of the evidence on a motion for a directed verdict, the evidence must be considered in its most favorable aspect to the appellee. If there is substantial evidence it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Cossack v. United States, 82 F. 2d 214, 215;
Vilson v. United States, 61 F. 2d 901.

It is not for the circuit court to say that the evidence was insufficient merely because the appellate court believes that inferences inconsistent with guilt may be drawn. The appellate court may say that the evidence is insufficient to sustain the verdict only if it can conclude as a matter of law that reasonable minds, as triers of the facts, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence.

Stoppelli v. United States (9th Cir.), 183 F. 2d 391, 393.

As discussed in connection with the denial of appellant's first motion, there was sufficient evidence from which the jury could infer guilt. In addition, upon denial of the motion, appellant testified in his own behalf. It

was established thereby that he was not only a part-time bartender at the Town House but that he was the general manager of this house of prostitution [Tr. p. 137, line 6]. Being general manager, he had more than a casual interest in recruiting personnel for the establishment, at the time when he discussed the details of the working conditions of the prostitutes at the Town House with Teen when he met her in the Keynoter Bar on the evening of September 26, 1955. Appellant testified further that Teen told him "she was trying to find a job somewhere and wanted to get out of town" [Tr. p. 143, lines 18 and 19]. In addition, appellant admitted he made a loan of approximately $50.00 to Teen on September 27, 1955 [Tr. p. 176, lines 12 to 15 incl.]. If this sum was not an advance on her anticipated earnings working as a prostitute for appellant at the Town House, why did he make the loan? Would not a reasonable mind conclude that appellant did not make the loan in broad daylight to a former prostitute whom he had just met in a bar the evening before but who had departed from the bar without him that evening, and whom he knew was looking for a job out of town. What expectation did appellant have of repayment unless he knew that she was to become an employee in his own place [appellant said it was his place. Tr. p. 125, line 25]? It is not reasonable to assume that a loan in such a sum and under these circumstances, was prompted by munificent motives without thought of repayment. The jury might have accepted the making of the loan as substantial evidence sufficient for them to believe that appellant at least aided Teen to be transported to the Town House by providing funds sufficient for her to obtain other transportation there.

> One who aids or abets in the commission of a crime is a principal.
>
> 18 U. S. C., Sec. 2(a).

Or the jury, if it did not believe that appellant transported Teen to Nevada, may have believed that he caused her to be transported there by advising her of the working conditions at the Town House and loaning money to her for the transportation.

> A person who causes an unlawful act to be done is guilty as a principal.
>
> 18 U. S. C., Sec. 2(b);
>
> *Nye & Nissen v. United States,* 168 F. 2d 846, 855, 336 U. S. 613, 620;
>
> *Russell v. United States,* 222 F. 2d 197;
>
> *United States v. Lieberman,* 15 F. R. D. 278.

C.

The Trial Court Committed No Error in Permitting Evidence on Cross-Examination of Appellant, Concerning Transportation by Appellant of Another Person From Los Angeles to Nevada at Times Other Than Alleged in the Indictment.

(a) It is a settled rule that the scope of the cross-examination is not confined to specific questions or details of the direct examination, but extends to the subject matter inquired about.

> *Salerno v. United States,* 61 F. 2d 419;
>
> *Cravens v. United States,* 62 F. 2d 261;
>
> *Little v. United States,* 93 F. 2d 954;
>
> *United States v. Johnson,* 129 F. 2d 954.

See also:

> *D'Aquino v. United States* (9th Cir., 1927), 192 F. 2d 338, cert. den. 343 U. S. 935.

Appellant testified on direct examination that he was bartender and manager of the Town House. He also testified that Peggy was manager. On cross-examination, the government sought to explain the ambiguity of the apparent existence of two managers of the Town House, and to further show the close relationship existing between appellant and Peggy as indicative of the greater measure of discretion which appellant had at the time he met Teen in Los Angeles, *i.e.,* discretion and authority to have offered employment or inducement to Teen to cause her to travel to the Town House to engage in prostitution, if not to affirmatively employ her and transport her to Nevada.

On cross-examination, appellant was questioned and answered as follows: "Q. Of course you were manager? A. In a sense, yes. [Tr. p. 159, lines 12 and 13]." The government sought to ascertain in just what sense appellant was manager of the house of prostitution, by showing his relationship with Peggy. This relationship was subsequently shown, in part, without objection by appellant, when appellant testified on further cross-examination that he and Peggy resided together in separate rooms, with a maid, in a residence adjacent to the Town House [Tr. p. 172, lines 21 to 23 incl.].

Appellant misstates the substance of the evidence elicited by the government at the phase in the cross-examination of which appellant now complains. At page 7, lines 4 to 10 inclusive of Appellant's Opening Brief, it is stated the trial court permitted "the Government to establish by cross-examination over appellant's objection that the latter had at times, other than alleged in the indictment transported a woman, other than the one named in the indictment, in interstate commerce for the purpose of

prostitution. . . ." The record is devoid of any evidence or proffered evidence that the co-manager Peggy was a prostitute. The evidence did not establish that Peggy was a prostitute although concerning the victim, Teen, alias Lee Thornton, it clearly established this element of the offense at the material time.

(b) If the government had sought to establish that appellant had also transported Peggy in interstate commerce at some prior time, for the purpose of prostitution, such evidence may have been properly admitted as evidence of commission by appellant of a similar crime, to show an intent, design or plan or scheme to transport women including Teen in interstate commerce for the purpose of prostitution.

Tedesco v. United States (C. C. A. 9), 118 F. 2d 737, 739-741.

It is competent on cross-examination, to develop all circumstances which qualify his direct testimony even though strictly speaking, such circumstances constitute new matter and are a part of the cross-examiner's own case.

Banning v. United States, 130 F. 2d 330, 339, cert. den. 317 U. S. 695.

(c) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Federal Rules of Criminal Procedure, Rule 52(a).

Error, if any, in cross-examination of accused's witness, did not require reversal where accused did not re-

quest withdrawal of a juror or mistrial or an instruction to disregard, and the court told the jury it would not be guided by anything but the testimony in the case.

United States v. Simon, 119 F. 2d 679, cert. den. 314 U. S. 623.

Similarly, error, if any, in the cross-examination of appellant, was harmless. It did not affect appellant's substantial rights, the trial court discouraged further inquiry on the subject [Tr. p. 160, line 25 *et seq.*], and appellant made no motion for a mistrial.

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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